

# Access to documents containing details that should have been made available in reports prepared under s 76 of the PID Act

[Marek](#) made this Freedom of Information request to [Commonwealth Ombudsman](#)

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The request was **refused** by [Commonwealth Ombudsman](#).

Marek May 23, 2022

Delivered

Dear Commonwealth Ombudsman,

## BACKGROUND

On 6 March 2022 I made a request to the Commonwealth Ombudsman. The request can be seen here:

<https://www.righttoknow.org.au/request/r...> ([https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/request\\_for\\_reports\\_prepared\\_by#outgoing-16835](https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/request_for_reports_prepared_by#outgoing-16835))

I made the request because I had noticed that the Commonwealth Ombudsman had contravened paragraph 76(2)(a) of the Public Interest Disclosure Act 2013. That paragraph requires the Ombudsman to prepare a report that must include:

(a) in relation to each agency, statements of the following:

- (i) the number of public interest disclosures received by authorised officers of the agency during the financial year;
- (ii) the kinds of disclosable conduct to which those disclosures relate;
- (iii) the number of disclosure investigations that the principal officer of the agency conducted during the financial year;
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations ...

I noticed that the Commonwealth Ombudsman had failed to what is required by the PID Act. Instead of preparing a report that had, in relation to EACH agency, statements of the things set out in (i) - (iv), the Ombudsman had prepared a report in which the things set out in (i)-(iv) were reported in relation to some agencies, and not for EACH agency.

I requested copies of the reports that the Ombudsman should have prepared in relation to each agency for the 2019-2020 and 2020-2021 financial years. On 20 May 2022 Sine Dellit, a senior legal officer in the Office of the Commonwealth Ombudsman, provided a decision in relation to my request. In that decision Ms Dellit refused access to the documents on the grounds that the reports do not exist/cannot be located. Ms Dellit's decision is set out here:

<https://www.righttoknow.org.au/request/r...> ([https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/request\\_for\\_reports\\_prepared\\_by#incoming-25771](https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/request_for_reports_prepared_by#incoming-25771))

The documents do not exist/could not be found because the Ombudsman did not prepare the reports according to the terms of paragraph 76(2)(a) of the Public Interest Disclosure Act 2013.

#### FOI REQUEST

Under subsection 76(3) of the Public Interest Disclosure Act 2013, the principal officer of an agency is required to give the Ombudsman such information and assistance as the Ombudsman reasonably requires in relation to the preparation of a report under section 76. That includes providing the details set out in paragraph 76(2)(a) of the Public Interest Disclosure Act 2013. The Australian Public Service Commissioner would have provided the details set out in paragraph 76(2)(a) to the Commonwealth Ombudsman so that the Ombudsman could prepare a report according to the terms of paragraph 76(2)(a) of the PID Act.

Since the Ombudsman has failed to do that which the Ombudsman was required to do under that paragraph in respect of the reports prepared for the 2019-2020 and 2020-2021 financial years, the Ombudsman should, through the FOI process, provide access to documents containing that information.

Under the FOI Act I request access to any and all documents HELD BY THE OFFICE OF THE COMMONWEALTH OMBUDSMAN which set out the following:

in relation to the Australian Public Service Commission (APSC), statements of the following for the 2019-2020 and 2020-2021 financial years:

- (i) the number of public interest disclosures received by authorised officers of the APSC during the financial year;
- (ii) the kinds of disclosable conduct to which those disclosures relate;
- (iii) the number of disclosure investigations that the principal officer (or his delegate/s) of the agency conducted during the financial year;
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations ...

Do not transfer this request to the Australian Public Service Commission. You are aware of the Federal Court's judgment in *Bienstein v Attorney-General [2007] FCA 1174*. You must abide by the terms of that judgment and the elucidation of the terms of section 16 of the FOI Act that Justice Gray provided in that judgment.

To the extent that a document can be prepared according to the terms of s 17 of the FOI Act, please make sure that you abide by the terms of that section.

Yours faithfully,

Marek

Marek June 08, 2022

**Delivered**

Dear Commonwealth Ombudsman,

It has been more than 14 days since I sent my FOI request. Would you please acknowledge receipt of the FOI request, according to the terms of the FOI Act? I should not have to constantly draw your attention to your duties under the law.

Yours faithfully,

Marek

Marek June 14, 2022

**Delivered**

Dear Commonwealth Ombudsman,

Still ignoring me I see.

Paragraph 15(5)(a) of the Freedom of Information Act provides:

On receiving a request, the agency or Minister MUST as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received.

So do the folks at the Office of the Commonwealth Ombudsman think they are above the law?

Yours faithfully,

Marek

Marek June 15, 2022

**Delivered**

Dear Commonwealth Ombudsman,

Still no acknowledgement of receipt of my FOI request?

Yours faithfully,

Marek

Marek June 16, 2022

**Delivered**

Dear Commonwealth Ombudsman,

It has been more than 14 days since I sent my FOI request. Would you please acknowledge receipt of the FOI request, according to the terms of the FOI Act?

Yours faithfully,

Marek

Marek June 17, 2022

**Delivered**

Dear Commonwealth Ombudsman,

Paragraph 15(5)(a) of the Freedom of Information Act provides:

On receiving a request, the agency or Minister MUST as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received.

I sent the Office of the Commonwealth Ombudsman my request on 23 May 2022. I have not received a notification confirming receipt of my FOI request. I have also sent four reminders to the Office of the Commonwealth Ombudsman that staff members have failed to confirm receipt. The emails are sent to the Ombudsman's generic "ombudsman[at symbol]ombudsman.gov.au" email address. When will the staff members in the Office of the Commonwealth Ombudsman confirm receipt?

Yours faithfully,

Marek

Sine Dellit, Commonwealth Ombudsman June 22, 2022

**2 Attachments**

image001.png

[10K Download](#)

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FOI 2022 10056 Decision 22 06 22.pdf

[374K Download](#) [View as HTML](#)

OFFICIAL

Dear Marek,

I attach the decision for your FOI request FOI-2022-10056.

Yours sincerely,

Sine Dellit

Senior Legal Officer | Legal Team

Commonwealth Ombudsman

Ph: 1300 362 072 | Fax: 02 6276 0123

Email: [1][CO request email]

[2][IMG]

Influencing systemic improvement in public administration

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References

Visible links

1. mailto:[CO request email]
2. [https://aus01.safelinks.protection.outlook.com/?](https://aus01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.ombudsman.gov.au%2F&data=05%7C01%7CInformation.Access%40ombudsman.gov.au%7C9fad753a498a456cfb5d08da299e3687%7C443ee9e811ff4c829e4139331045260a%7C0%7C0%7C637868056759984181%7CUnknown%7CTWFpbGZsb3d8eyJWljoIMC4wLjAwMDAiLCJQIjoiV2luMzliLCJB Til6lk1haWwiLCJXVCi6Mn0%3D%7C3000%7C%7C&sdata=%2FPuLyEIIo0AS%2B25eF0lwQleJxAdZd%2BGM9U5zIxcgH0%3D&reserved=0)

Marek June 29, 2022

**Delivered**

Dear Ms Dellit,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request a complete internal review of Commonwealth Ombudsman's handling of my FOI request 'Access to documents containing details that should have been made available in reports prepared under s 76 of the PID Act'.

In my request, I asked for:

access to any and all documents HELD BY THE OFFICE OF THE COMMONWEALTH OMBUDSMAN which set out the following:

in relation to the Australian Public Service Commission (APSC), statements of the following for the 2019-2020 and 2020-2021 financial years:

- (i) the number of public interest disclosures received by authorised officers of the APSC during the financial year;
- (ii) the kinds of disclosable conduct to which those disclosures relate;
- (iii) the number of disclosure investigations that the principal officer (or his delegate/s) of the agency conducted during the financial year;
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations ...

You have refused to provide the documents requested on the basis of paragraph 37(1)(b) of the FOI Act. Your reasons were as follows:

"The Documents contain information about the APSC in relation to its receipt, assessment, processing and responses to public interest disclosures and investigations under the Public Interest Disclosure Act 2013

(PID Act) for the years 2019-20 and 2021-21.

Having considered the content of the Documents, I am satisfied that the disclosure of the documents could reasonably be expected to disclose or enable a person to ascertain the existence or identity of confidential sources of information (i.e. disclosers who made disclosures under the PID Act).

This information is not in the public domain."

Your reasons are nonsense.

It is not clear what "information" you are advertising to you state "This information is not in the public domain." To the extent that you are advertising to the information that was supposed to be included in a report prepared by the Commonwealth Ombudsman pursuant to paragraph 76(2)(a) of the PID Act, that information is not in the public domain because the Ombudsman failed to do what he was required to do by the Parliament.

It is no answer to a request for information that the public ought to, as of right, have access to, to state that the information is not in the public domain because the Commonwealth Ombudsman failed to provide that information according to law.

The Ombudsman (Michael Manthorpe) failed to undertake his lawful duties in 2019-2020 and 2020-2021 to prepare reports setting out statements of the following in relation to the APSC:

- (i) the number of public interest disclosures received by authorised officers of the APSC during the financial year;
- (ii) the kinds of disclosable conduct to which those disclosures relate;
- (iii) the number of disclosure investigations that the principal officer (or his delegate/s) of the agency conducted during the financial year;
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations ...

You have conceded that point here - <https://www.righttoknow.org.au/request/a...> ([https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/access\\_to\\_documentsContaining\\_d#incoming-26405](https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/access_to_documentsContaining_d#incoming-26405)).

Those statements are available to the OCO in various documents.

Those documents, with relevant redactions to content that is extraneous to the requirements of paragraph 76(2)(a) of the PID Act should be provided to me because I would, had the Ombudsman acted according to law, be entitled to review that information. That includes the identity of any discloser.

A full history of my FOI request and all correspondence is available on the Internet at this address: <https://www.righttoknow.org.au/request/a...> ([https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/access\\_to\\_documentsContaining\\_d](https://web.archive.org/web/20221107184249/https://www.righttoknow.org.au/request/access_to_documentsContaining_d))

Yours faithfully,

Marek

## **4 Attachments**

image001.png

**276K Download**

FOI 2022 10056 Review Decision.pdf

**289K Download View as HTML**

Item 8 Draft Annual Report Appendix Tables Financial Year 2020 21 redacted.pdf

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**Show all attachments**

OFFICIAL

Dear Marek

I refer to your request of 29 June 2022 for an internal review of an FOI decision dated 22 June 2022 (ref. FOI-2022-10056).

A letter outlining my decision is attached, in addition to 2 associated documents.

Yours sincerely,

Polly Porteous

Director, Legal team

COMMONWEALTH OMBUDSMAN

Proud to be working on the lands of the Gadigal people of the Eora nation

Ph: 1300 362 072

Email: [1][email address]

Website: [2]www.ombudsman.gov.au

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The Office of the Commonwealth Ombudsman acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community. We pay our respects to elders past and present.

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References

Visible links

1. mailto:[email address]
2. <http://www.ombudsman.gov.au/> (<https://web.archive.org/web/20221107184249/http://www.ombudsman.gov.au/>)

**Marek left an annotation (July 31, 2022)**

REASONS FOR IC REVIEW

On 29 July 2022 Polly Porteous, the Director of the Legal Team at the Office of the Commonwealth Ombudsman, provided me with a decision in respect of a request for internal review of Ms Sine Dellit's original FOI decision of 22 June 2022.

Ms Porteous set aside Ms Dellit's reasons.

Ms Porteous identified 8 documents falling within the scope of my FOI request. Six were denied access to. Two were partially granted access to.

Ms Porteous' decision to refuse access to 6 documents because:

- a) a conditional exemption (set out in s 47E(d) of the FOI Act) applies to those documents; and
- b) it is, on balance, not in the public interest to grant access to those document.

Her reasons for claiming that s 47E(d) applies to the documents are:

1. the real possibility Commonwealth agencies (including the APSC) will become less willing to furnish complete information to this Office when requested to do so as a part of our annual report data collection process, if agencies are aware their individual responses could potentially be released under the FOI Act;
2. the substantial adverse effect this might have on this Office's relationships with all Commonwealth agencies as the oversight body for the PID scheme;
3. the related substantial adverse effect on our capacity to carry out important functions of the Ombudsman under ss 76(1) and (2) of the PID Act;
4. the APSC's reasonable expectation that data for agencies handling only a small number of PID matters would ultimately be published in an aggregated form (given the Office's historical practice of using this approach);
5. that the APSC may have acted in reliance of this reasonable expectation in both 2019-20 and 2020-21 when considering whether to exercise the discretion available to agencies under s 76(4) of the PID Act (i.e. to delete information from a document given to the Ombudsman under s 76(3) of the PID Act, in specified circumstances); and
6. that access could diminish the future flow of information to agencies which only handle small numbers of disclosures – from disclosers, witnesses, staff and other third parties – if these people perceive the confidentiality of their participation in PID processes may be undermined by the release of information under the FOI Act.

#### ASSESSMENT OF REASONS IN SUPPORT OF s 47E(d) CONDITIONAL EXEMPTION.

Section 47E(d) of the FOI Act provides:

A document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Ms Porteous claims that there is "the real possibility Commonwealth agencies (including the APSC) will become less willing to furnish complete information to this Office when requested to do so as a part of our annual report data collection process, if agencies are aware their individual responses could potentially be released under the FOI Act". One what basis is this claim made?

The principal officer in every agency must give the Ombudsman such information and assistance as the Ombudsman reasonably requires in relation to the preparation of a report under this section. It is the law (see s 76(3) of the Public Interest Disclosure Act 2013). Whether they are willing or not, there is no possibility of Commonwealth agencies (including the APSC) failing to furnish such information and assistance that the Ombudsman reasonably requires in relation to the preparation of a report under s 76 of the PID Act. It would be unlawful to refuse to do so. Individual responses would not need to be released under the FOI Act if the Office of the Commonwealth Ombudsman prepared reports in accordance with s 76(2) of the PID Act. The Senior Legal Officer in the Office of the Commonwealth Ombudsman has conceded that the Ombudsman failed, in the 2019-2020 and 2020-2021 financial years, to prepare reports in accordance with s 76(2) of the PID Act (see <https://www.righttoknow.org.au/request/r...>). It is no answer to a request for documents setting out information that must be included in a public report to say that the document is conditionally exempt and that the document cannot be redacted to remove information that should have been published, by command of the Parliament, under s 76(2) of the PID Act.

Ms Porteous' first reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested (at least in so far as they can be redacted to remove information that would not be published has the Ombudsman done his job properly and prepared reports in accordance with s 76(2) of the PID Act).

Ms Porteous claims that publication of the documents requested "MIGHT" have a substantial adverse effect on the OCO's relationships with all Commonwealth agencies as the oversight body for the PID scheme.

First, a document is conditionally exempt under s 47E(d) if disclosure of the document "WOULD, or COULD REASONABLY BE EXPECTED TO, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency". It is of no relevance to advancing the claim that the conditional exemption applies that the disclosure "MIGHT" have a substantial adverse effect on the OCO's relationships with all Commonwealth agencies as the oversight body for the PID scheme. The legal threshold has not been met.

Second, how "WOULD", or "COULD IT BE REASONABLY EXPECTED" that the publication of the documents would have a substantial adverse effect on the OCO's relationships with all Commonwealth agencies as the oversight body for the PID scheme? If it would, it must be clear that it would. It is not self-evident. If it could be reasonably expected to have a substantial adverse effect, one would have to provide a reasoned explanation – that is what the qualification "reasonably" requires. Nothing of the sort has been provided.

Obviously, Ms Porteous' second reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested.

Ms Porteous claims that there would be "the related substantial adverse effect on our capacity to carry out important functions of the Ombudsman under ss 76(1) and (2) of the PID Act".

First, in relation to what? If it is in relation to the second reason proffered, it has been demonstrated that the second reason is without merit. Therefore the third reason would collapse. But let it be assumed that the third reason stands on its own. If it does, it is nothing more than a bald assertion. What has been provided to support the assertion advanced? Nothing is the answer.

Obviously, Ms Porteous' third reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested.

Ms Porteous claims that the APSC has "a reasonable expectation that data for agencies handling only a small number of PID matters would ultimately be published in an aggregated form". On what basis would the APSC have such an expectation?

Section 76(2)(a) of the PID Act provides, in relation to EACH AGENCY, that the following information must be reported to the Parliament by the Ombudsman:

- (i) the number of public interest disclosures received by authorised officers of the APSC during the financial year;
- (ii) the kinds of disclosable conduct to which those disclosures relate;
- (iii) the number of disclosure investigations that the principal officer (or his delegate/s) of the agency conducted during the financial year;
- (iv) the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations

The APSC's expectations could not be anything other than what the law explicitly provides. The fact that

Commonwealth Ombudsman has failed to do what he is required to do under a law of the Commonwealth can never inform a reasonable expectation on the part of an agency because anything that does not conform to the requirements of an enactment of the Commonwealth Parliament can never sustain an expectation. Legality exhausts the limits of reasonable expectations.

It follows, plainly, that Ms Porteous' fourth reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested.

Ms Porteous claims that the "APSC MAY have acted in reliance of this reasonable expectation in both 2019-20 and 2020-21 when considering whether to exercise the discretion available to agencies under s 76(4) of the PID Act (i.e. to delete information from a document given to the Ombudsman under s 76(3) of the PID Act, in specified circumstances)".

First, it is entirely unclear how this reason support the conditional exemption set out in s 47E(d).

Second, it is plainly the case that any reliance that the principal officer of, or anybody else in, the APSC placed on an expectation that the information set out in s 76(2)(a) of the PID Act, which the Ombudsman should have reported to the Attorney General so that the AG could submit that information to the Parliament, would not be made available to the Parliament is without basis.

Third, the fact that the documents setting out the information in s 76(2)(a) of the PID Act, which should have been reported to the Parliament, might have other details that could have attracted exemptions under the FOI Act does not excuse the decision maker from granting access to the documents if the information can be redacted. No serious attempt has been made by the decision maker to explain why information other than what should have been made available pursuant to s 76(2) of the PID Act for the 2019-2020 and 2020-2021 financial years cannot be redacted so that the documents can be granted access to.

Ms Porteous' fifth reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested and is unconvincing.

Ms Porteous claims that access to the requested documents "could diminish the future flow of information to agencies which only handle small numbers of disclosures – from disclosers, witnesses, staff and other third parties – if these people perceive the confidentiality of their participation in PID processes may be undermined by the release of information under the FOI Act".

First, on what basis is the claim that granting access to the requested document "could diminish the future flow of information to agencies which only handle small numbers of disclosures – from disclosers, witnesses, staff and other third parties – if these people perceive the confidentiality of their participation in PID processes may be undermined by the release of information under the FOI Act"? There is no evidence for this assertion. It is just that – a bald assertion.

Second, on what basis has a distinction been drawn between agencies "which only handle a small number of disclosure" and agencies that do not? There is no lawful basis for drawing a distinction between agencies that handle 4 or less PID requests per financial year and agencies that handle more. That number – 4 – is entirely arbitrary and has no basis in law.

Third, and related to the second point, why should agencies that handle 4 or fewer public interest disclosure have the advantage of not having the information that is required to be set out, by s 76(2)(a) of the PID Act, relating to

each such agency when the law provides that such information MUST be reported by the Ombudsman in relation to each such agency? There is no lawful basis for granting agencies with four or fewer PID investigations such an advantage by reporting relevant information in an aggregated manner, in contradiction to the requirements of the PID Act.

Fourth, if the reason proffered by Ms Porteous were true, it would follow that the agencies for which the Ombudsman has reported the information that he was required to report would have seen a drop in disclosures because “disclosers, witnesses, staff and other third parties” perceived that the information that the Ombudsman had to report would undermine some misconceived claim to “confidentiality”. Plainly, it is not the case that disclosures have dropped off to the point of 4 or fewer in the agencies in which the Ombudsman has reported the things he had to under s 76(2) of the PID Act in his annual reports. This one of Ms Porteous’ reasons is as detached from reality as it is idiotic.

Fifth, all people who make PID disclosures are aware that the Ombudsman is under a legal obligation to prepare a report setting out the information he must set out pursuant to s 76(2)(a) of the PID Act. That information does not undermine any reasonable claims to confidentiality. No personal information is disclosed when the information that must be published under s 76(2) of the PID Act is published in the annual report. Thus, no reasonable person could form the view that access, under the FOI Act, to, documents, appropriately redacted if necessary, containing information that should have been published pursuant to s 76(2) of the PID Act, would undermine the confidentiality of their participation in PID processes.

Ms Porteous’ sixth reason does not support the contention that s 47E(d) of the FOI Act applies to the documents requested and it is unconvincing.

For the reasons identified, s 47E(d) has no application to the documents requested. Accordingly, no public interest assessment need take place on the basis of the conditional exemption claimed under s 47E(d) and the documents that have been denied access to under that conditional exemption should be granted access to.

For the record, I have no interest in personal information contained in the documents requested. Indeed, I have no interest in any information in the documents other than the information covered by s 76 of the PID Act.

I am only asking for access to information in documents that I should, as all Australians should, have access to as of right. The Commonwealth Ombudsman has failed to provide that information according to law. The FOI Act provides a means by which I can access documents containing that information. I am merely exercising my right to access that information. Gaining access to documents that contain information that should be available to the public should not be so difficult.

Commonwealth Ombudsman July 31, 2022

[1]Office of the Australian Information Reference Code:  
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992 | [4][email address]

GPO Box 5218, Sydney NSW 2001

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#### References

##### Visible links

2. <http://www.oaic.gov.au/> (<https://web.archive.org/web/20221107184249/http://www.oaic.gov.au/>)

3. file:///tmp/tel:1300 363 992

4. mailto:[email address]

Commonwealth Ombudsman July 31, 2022

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